

# RESOURCE CENTER REPORT

*University of Wisconsin Law School  
Resource Center on Impaired Driving*

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## UNITED STATES SUPREME COURT

***Crawford v. Washington*, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).**

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” Here, the Supreme Court held that the Sixth Amendment’s Confrontation Clause prohibited the admission at trial of a tape recorded statement made to police by an eye-witness to a stabbing, although the statement held sufficient indicia of reliability, when the witness did not testify in court.

Defendant stabbed a man who allegedly tried to rape Defendant’s wife. Police interrogators tape-recorded a statement from Defendant’s wife, in which she described the stabbing. Her account arguably conflicted with Defendant’s claim of self-defense. The trial court allowed the statement to be played over defense counsel’s

argument that admitting the statement violated Defendant’s right to confrontation under the Sixth Amendment. On appeal, the Washington Supreme Court upheld the admission of the statement, and the United States Supreme Court reversed and remanded that decision.

In this case, the Supreme Court overturns *Ohio v. Roberts*,<sup>1</sup> which allowed certain hearsay statements to be used when they bore adequate “indicia of reliability.”<sup>2</sup> Here, the Court drew a distinction between testimonial and nontestimonial hearsay, rather than following the *Roberts* test of reliability. Under the new rule, testimonial hearsay violates the Confrontation Clause, regardless of the reliability of the statement or its categorization as a hearsay exception, unless (1) the witness is genuinely not available to testify, and (2) there has been prior opportunity for cross-examination. The Confrontation Clause is not implicated when statements are nontestimonial. In addressing the meaning of the term “testimonial,” the Court

declined to elaborate beyond providing a dictionary definition and stating that the new rule applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations. Thus, statements such as these would not be admissible, absent unavailability of the declarant and prior opportunity for cross-examination.

Justice Scalia, in writing for the majority, provided a comprehensive historical account of the common law right to confrontation, illustrating that the *Roberts* reliability test was at odds with the Sixth Amendment because the common law as it existed at the 1791 adoption of the Sixth Amendment did not allow out-of-court testimonial statements to be read at trial unless the declarant was unavailable and the accused had had prior opportunity to cross-examine. In overturning *Roberts*, the Court concluded that regardless of reliability, when a statement is testimonial the Sixth Amendment demands

unavailability of the declarant and prior opportunity for cross-examination, as was required under the common law.

Chief Justice Rehnquist, in a concurring opinion, expressed concern regarding the majority's refusal to provide a more comprehensive definition of "testimonial." The Chief Justice reasoned that because prosecutors apply the rules of evidence in court every day, they need a clear indication of what specific kinds of statements are covered by the new rule, and they cannot wait months or years to receive that direction.

**POTENTIAL IMPLICATION FOR WISCONSINOWICASES**  
In Wisconsin, when analysts at the crime lab and State Laboratory of Hygiene perform chemical tests and are later unavailable to testify as to the reliability of the tests, supervisors have been allowed to testify in their place, under *State v. Williams*.<sup>3</sup>

In *Williams*, the defendant was convicted of possession of cocaine with intent to deliver. His conviction was based in part on the testimony of the state crime lab unit leader, who testified as to her opinion that the substance found in Williams's pocket contained cocaine base. The defendant argued that allowing the unit leader to testify violated the defendant's right under the Confrontation Clause because the unit leader was not the analyst who performed the test.

The court, however, held that the testimony of the unit leader at trial provided the defendant with sufficient opportunity to cross-examine, because the unit leader had expertise in the field and had stated her own opinion rather than having acted as a conduit for the opinion of another.

Since *Williams*, lab supervisors in Wisconsin have been allowed to testify in cases in which the analyst who performed the test is unavailable, even when the lab reports themselves have been excluded as hearsay. The new rule of *Crawford* may change that, depending upon whether the data contained in a lab report is considered testimonial in nature, and if so, whether an expert may base his or her testimony on inadmissible hearsay under *Crawford*.

**POTENTIAL LIMITATIONS**  
Courts have begun to address the implications of *Crawford*, and to interpret the term "testimonial." For example, in *United States v. Cozzo*,<sup>4</sup> the defendant cited *Crawford* in his objection to the admission of surveillance tapes. The court concluded, however, that *Crawford* does not provide a basis for excluding surveillance tapes because they are not testimonial.<sup>5</sup>

To avoid Confrontation Clause violations when it is known in advance that a witness may be unavailable at trial, prosecutors may preserve the witness's testimony by ensuring the defendant has the opportunity for cross examination at a

pretrial proceeding.<sup>6</sup> If the witness is genuinely unavailable to testify at trial, this practice would seemingly satisfy the demands of *Crawford*.

***Iowa v. Tovar*, 124 S. Ct. 1379, \_\_\_ U.S. \_\_\_ (2004).**

The United States Supreme Court addressed another Sixth Amendment issue in *Iowa v. Tovar*; namely, the right to counsel.

Iowa presented a narrow issue to the Supreme Court; specifically, "Does the Sixth Amendment require a court to give *pro se* defendants pleading guilty a rigid and detailed admonishment that an attorney may be useful, that an attorney may provide an independent opinion as to whether it is wise to plead guilty, and that without an attorney the defendant risks overlooking a defense?"<sup>7</sup> The Supreme Court held that neither of the warnings mandated by the Iowa Supreme Court is required by the Sixth Amendment. The Court concluded that the constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him or her, of the right to be counseled regarding his or her plea, and of the range of allowable punishments attendant upon the entry of a guilty plea.<sup>8</sup>

In this case, the defendant challenged a prior OWI conviction that the state was using to enhance a pending OWI charge from a second-offense

aggravated misdemeanor to a third-offense felony. Through counsel, Mr. Tovar argued that a 1996 waiver of counsel was invalid because the court never made him aware of the dangers and disadvantages of self-representation. Thus, he maintained that the waiver was not knowing, intelligent and voluntary.<sup>9</sup>

The Sixth Amendment safeguards an accused's right to counsel at all critical stages of the criminal process. Because Mr. Tovar received a two-day jail term for his 1996 conviction, he had a right to counsel at the plea stage and at trial. However, while the Constitution provides the right to counsel, it does not force a lawyer upon a defendant. Rather, it requires that any waiver of that right be "knowing, voluntary, and intelligent."<sup>10</sup> The Court has previously described a waiver of counsel as intelligent when the defendant "knows what he is doing and his choice is made with eyes open."<sup>11</sup> However, the Court has declined to prescribe a specific formula or script to be read to a defendant who states that he or she elects to proceed without counsel. Further, the Court leaves it to States to adopt by statute, rule, or decision any guides for the acceptance of an uncounseled plea they deem useful.<sup>12</sup>

#### IMPLICATIONS FOR *STATE V. KLESSIG*<sup>13</sup>

The Supreme Court in *Tovar* clearly limits its decision to the

two admonitions the Iowa Supreme Court mandated, and addresses only the Iowa Supreme Court's faulty interpretation of the Sixth Amendment. Thus, it seems reasonable that unless the Wisconsin Supreme Court takes up the issue, its holding in *State v. Klessig* remains the rule of law. Specifically, the court in *Klessig* held that to satisfy a valid waiver of counsel, "the circuit court must conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him."<sup>14</sup> However, the supreme court has overruled itself on this issue previously. In reaching its decision in *Klessig*, the court explicitly overruled *Pickens v. State*<sup>15</sup> in that it mandated the use of this colloquy in every case where a defendant was *pro se*, to prove a knowing and voluntary waiver of the right to counsel. Therefore, given that the supreme court has overruled itself in this arena before, it certainly could again should the issue come before the court for consideration.

#### WISCONSIN SUPREME COURT

*State v. Kyles*, 2004 WI 15, 269 Wis. 2d 1, 675 N.W.2d 449.

The Wisconsin Supreme Court recognized that an officer need not subjectively believe that his safety or that of others is in danger before conducting a protective search for weapons. However, an officer's subjective belief about whether his safety was in danger may be considered as a relevant factor in determining the reasonableness of the officer's suspicion that the individual being frisked might be armed and dangerous.

Defendant was a passenger in a vehicle that was stopped for operating without headlights after dark. The driver consented to a search of the vehicle, and both the driver and the defendant exited. Defendant was wearing a large, fluffy coat, and he placed his hands in his pockets after leaving the vehicle. The officer directed the defendant several times to keep his hands out of his pockets; each time, the defendant complied but inserted his hands into his pockets again almost immediately. While the officer testified that he did not believe he was in danger, he conducted a frisk of the defendant. While the frisk did not uncover any weapons, it did reveal marijuana. The circuit court ordered the marijuana suppressed, and the court of appeals affirmed. The State appealed on two issues.

The court agreed with the State's assertion that an officer's subjective belief that he is in danger is not necessary for a valid frisk, reiterating that the standard test for reasonable

suspicion is an objective one. The court, however, declined to adopt the bright-line rule proposed by the State; namely, that an officer may not be questioned about his belief that his safety was at risk when confronting the person frisked. According to the court, an officer's belief that his safety is at risk is one factor that may be considered in evaluating the totality of the circumstances.

Here, considering the totality of the circumstances; namely, the size of the defendant's coat, the placement of his hands in his pockets, his nervousness, and the time and location of the stop, the court was not convinced that the frisk was justified.

#### IMPACT ON *STATE V. MOHR*<sup>16</sup>

The State asserted that *State v. Mohr* stands for the proposition that an officer must believe he is in danger before he can conduct a frisk, and that such a holding was error by the court of appeals. The court disagreed, stating that *Mohr* did not hold that an officer must fear for his safety in order to have grounds for reasonable suspicion that the person to be frisked is armed and dangerous. The court thus declined to overturn *Mohr*.

#### *State v. Gallion*, 2004 WI 42, 678 N.W.2d 197.

In this case, the Wisconsin Supreme Court revisited the issue of sentencing discretion, post truth-in-sentencing. In

reaffirming the standard articulated in *McCleary v. State*,<sup>17</sup> the court held that in future cases, sentencing decisions must be set forth on the record in greater detail than had been required under *McCleary*. Under *McCleary*, a sentencing court was required to set forth the exercise of discretion on the record, including a statement of reasons for the sentence imposed.<sup>18</sup> *McCleary* also required that the sentence in each case call for the minimum amount of confinement consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant.<sup>19</sup>

According to the court, the principles set forth in *McCleary* had been eroded and it had become standard that meaningful appellate review could be avoided if a sentencing judge simply used the correct words. Under the new rule, the oral pronouncement of a sentence must include (1) the general objectives that a criminal sentence may address,<sup>20</sup> (2) the general objectives of greatest importance in the particular case, (3) the factors that were considered in arriving at the sentence, (4) how those factors influenced the decision, (5) how the component parts of the sentence advance the specified objectives in light of the facts of the case, and (6) if probation is rejected, the reasons behind that decision. Sentencing discretion cannot be applied with

mathematical precision; therefore, the amount of explanation that is necessary will vary from case to case.

Here, the defendant was found guilty of homicide by intoxicated use of a motor vehicle, and sentenced to 21 years of confinement followed by nine years of extended supervision. On appeal, he claimed the judge abused his sentencing discretion by (1) not explaining why a lengthy sentence was appropriate, (2) using the good character of the victim as evidence of the gravity of the offense, and (3) imposing a sentence that was unduly harsh.

In response to Defendant's first argument, the court found that the sentencing judge's explanation of his reasons for the sentence was sufficient based on the law as it had been understood since *McCleary*, and that neither due process nor *McCleary* required the detail Defendant sought.

The supreme court also held that it was not abuse of discretion for the sentencing court to consider the good character of the victim in its evaluation of the gravity of the offense. Sentencing courts possess wide discretion in determining what factors are relevant to their decisions. The character of the victim and the impact of the crime on the people who were close to the victim are relevant to the gravity of the offense.

In his final argument, Defendant claimed that the sentencing judge abused his discretion by imposing a sentence that was unduly harsh. His argument was based in part on the reclassification of the offense for which he was convicted. Subsequent to the imposition of Defendant's sentence, the legislature reduced the maximum term of confinement for homicide by intoxicated use of a motor vehicle to 15 years. The court rejected Defendant's argument, holding that because the legislature chose not to make the change retroactive when it had the opportunity to do so, the sentence was not unduly harsh and the sentencing judge did not abuse his discretion.

#### POTENTIAL IMPACT

Clearly, sentencing judges must now set forth the reasons for their decisions more thoroughly on the record. While under *McCleary* it was enough to rely on implied rationale, judges must now explicitly state how each of the component parts of the sentence furthers the purpose of the sentence. The majority's failure, however, to provide more concrete guidance as to how much explanation is sufficient could possibly lead to more frequent sentence modifications in the future.

***State v. Naydihor*, 2004 WI 43, 270 Wis. 2d 585, 678 N.W.2d 220.**

In affirming the denial of Defendant's motion for

postconviction relief, the Wisconsin Supreme Court addressed Defendant's claims of ineffective assistance of counsel and judicial vindictiveness. The court found that the prosecutor did not breach the plea agreement at resentencing by emphasizing the gravity of the offense, the negative aspects of Defendant's character, and the deteriorated condition of the victim. Therefore, defense counsel was not ineffective in failing to object to the prosecutor's comments during the resentencing hearing. Further, Defendant's right to due process was not violated because the sentence imposed at resentencing was not the product of judicial vindictiveness.

In this case, Defendant pled guilty to causing great bodily harm by intoxicated use of a motor vehicle for an incident where a woman was severely injured when Defendant ran a red light and collided with the victim's vehicle. After his sentencing, Defendant sought post-conviction relief alleging the prosecutor breached the plea agreement. The State did not oppose the postconviction motion, and the trial court ordered resentencing before a different judge.

As part of the plea agreement, which was in effect at both the original sentencing and the resentencing, the prosecutor had agreed to recommend probation but retained the right to recommend the conditions and length of probation. At

resentencing, the victim testified that since the time of the first sentence, her condition had deteriorated. The prosecutor recommended 10 years of probation with several very strict conditions.<sup>21</sup> In making his sentencing argument, the prosecutor called the court's attention to the victim's deteriorated condition, the gravity of the offense, the Defendant's threat to public safety, Defendant's lengthy history of substance abuse, his continued use of illegal substances while out on bond, his cavalier attitude regarding drug use, and the necessity of sending a message that this type of behavior will not be tolerated.

The judge at resentencing imposed a longer sentence than the defendant had originally received, citing the victim's statement and her deteriorated condition. Defendant had originally been sentenced to three years of confinement, followed by five years of extended supervision. At resentencing, he received a sentence of five years of confinement followed by five years of extended supervision. Defendant again moved for postconviction relief, requesting resentencing and a hearing on his claim of ineffective assistance of counsel. The motion was denied, and he appealed. The court of appeals affirmed, and Defendant appealed to the Wisconsin Supreme Court.

Defendant's claim of ineffective

assistance of counsel was based on his attorney's failure to object to the prosecutor's comments at resentencing. Defendant claimed these comments amounted to a breach of the plea agreement because the prosecutor implied that he favored a harsher sentence than what he was recommending. The court disagreed, citing *State v. Hanson*<sup>22</sup> for the proposition the State may discuss negative facts about a defendant in order to justify a recommended sentence within the parameters of the plea agreement. The court concluded that the prosecutor at Defendant's resentencing was not implying that he no longer believed in the plea agreement; instead, he was making an argument for the rather long term of probation and the numerous restrictive conditions he recommended on the probation. Because the State did not breach the plea agreement, defense counsel was not ineffective in failing to object.

Defendant further argued that the longer sentence imposed at his resentencing was a result of judicial vindictiveness and was thus a violation of his right to due process. Defendant claimed that under *North Carolina v. Pearce*<sup>23</sup> his increased sentence created a presumption of vindictiveness that was never rebutted. In *Pearce*, the defendant successfully moved for postconviction relief based on a claim that his right to due process was violated when he was given a longer sentence at

resentencing, because the new sentence was a result of vindictiveness by the judge for the defendant's having successfully attacked his first conviction. Because the fear of such vindictiveness may have a chilling effect on a defendant's exercise of the right to appeal a conviction, the Court in *Pearce* concluded that due process requires that whenever a judge imposes a longer sentence upon a defendant after a new trial, the reasons for doing so must appear on the record. However, *Pearce* has been limited to cases in which there is a reasonable likelihood that the increased sentence is the result of actual judicial vindictiveness; here, there was no reasonable likelihood of actual vindictiveness because the original sentencing court had not been reversed and the court that resentenced Defendant was not the same one that imposed his original sentence. Therefore, no presumption of vindictiveness was warranted here.

Further, even if the *Pearce* presumption were to apply in this case, the presumption was overcome. The resentencing court justified the increased sentence on the grounds that the victim's condition had deteriorated and her medical bills had increased. Those factors justified the imposition of a more severe sentence, and because those factors were set forth affirmatively on the record, any presumption of judicial vindictiveness would have been

overcome.

## COURT OF APPEALS

***State v. Miller*, 683 N.W.2d 485 (2004).**

This case involved two proceedings stemming from an incident in which Defendant was charged with OWI and OWI-PAC (prohibited alcohol concentration). In the first proceeding, the State violated a discovery rule, and its proffered evidence was excluded as a result. The case was dismissed, the charges were refiled, and the case was assigned to a new judge. The new judge denied Defendant's motion to exclude the evidence at the second proceeding, and Defendant appealed. Here, the Court of Appeals held that it was not error for the judge at the second proceeding to deny Defendant's motion and allow the evidence.

After being charged with OWI fifth offense and operating with a PAC, Defendant filed a discovery demand for all reports of expert witnesses or written summaries of experts' findings. The State did not provide any such material until five and a half months after the request, on the Friday before the Monday jury selection. At that time, defense counsel received a summary of the State's expert's testimony on the Blood Alcohol Content (BAC) of Defendant at the time of the incident. Defendant filed a motion to exclude the testimony, asserting that the State had not provided

the summary within a reasonable time before trial.

As a sanction for the State's violation of the discovery statute, *Wis. Stat. § 971.23* (2001-02),<sup>24</sup> the trial court granted Defendant's motion to exclude the testimony. The State then filed a motion to dismiss the case without prejudice, and the court granted the motion. The State subsequently refiled the charges, and Defendant moved to exclude the expert's testimony at the second trial. That motion was denied, and Defendant was convicted by a jury on both charges.

On appeal, Defendant claimed the trial court in the second proceeding erred in denying his motion to exclude the expert's testimony. He based his claim on the grounds of equal protection, issue preclusion,<sup>25</sup> claim preclusion,<sup>26</sup> and estoppel by record.<sup>27</sup> He also asserted that the legislative intent behind *Wis. Stat. § 971.23*, as well as judicial estoppel,<sup>28</sup> required the trial court in the second proceeding to exclude the testimony.

The Court of Appeals concluded that the trial court in the second proceeding was not required to exclude the expert's testimony under § 971.23 or the Fourteenth Amendment's Equal Protection Clause. Nor was exclusion required by issue preclusion, claim preclusion, estoppel by record, or judicial preclusion. According to the court, the State was acting within its authority

when it dismissed and refiled the charges. Provided the evidence is otherwise admissible and the State abides by discovery rules in the second proceeding, the evidence will be admissible in the second proceeding.

1. 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980).
2. 448 U.S. 56, 66, 100 S. Ct. 2531, 2539, 65 L. Ed. 2d 597, LEHR8 (1980).
3. 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919.
4. 2004 U.S. Dist. LEXIS 7391.
5. See also *People v. Moscat*, 2004 N.Y. Misc. LEXIS 231 (holding that a 911 call is not testimonial), *State v. Forrest*, 2004, N.C. App. LEXIS 827 (holding that a spontaneous statement made to police immediately after rescue was not testimonial), *United States v. Massino*, 2004 U.S. Dist. LEXIS 9733 (holding that a guilty plea by co-defendant was testimonial), *Smith v. State*, 2004 Ala. Crim. App. LEXIS 93 (holding that an autopsy report was not testimonial but that admitting it without the testimony of the pathologist who performed the autopsy was nonetheless a violation of the Confrontation Clause).
6. *Jones v. Albaugh*, 2004 U.S. Dist. LEXIS 4529.
7. 124 S. Ct. 1379, 1389 (2004).
8. *Id.*, at 1381.
9. *Id.*, at 1386.
10. *Id.*, at 1387.
11. *Id.*
12. *Id.*, at 1390.
13. 211 Wis. 2d 194, 564 N.W.2d 716 (1997).
14. *Id.*, at 206.
15. 96 Wis. 2d 549, 292 N.W.2d 601 (1980).
16. 235 Wis. 2d 220, 613 N.W.2d 186 (Wis. Ct. App. 2000).

17. 49 Wis. 2d. 263, 182 N.W.2d 512 (1971).
18. 49 Wis. 2d 263, 280-281, 182 N.W.2d 512, 521 (1971).
19. 49 Wis. 2d 263, 276, 182 N.W.2d 512, 519 (1971).
20. The general objectives identified here by the court as those that a criminal sentence may address are (1) protection of the community, (2) punishment, (3) rehabilitation of the defendant, and (4) deterrence of others.
21. The prosecutor also recommended one year in jail and 2000 hours of community service for a bail-jumping charge.
22. 232 Wis. 2d 291, 606 N.W.2d 278 (Wis. Ct. App. 2000).
23. 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656, (1969).
24. The court acknowledged that statutes relevant to the appeal have been amended since the original charges were filed against Defendant, but noted that the changes are minor. The court continued to cite the 2001-02 version of the statutes. Accordingly, in this article, all further references to the Wisconsin Statutes are to the 2001-02 version.
25. Issue preclusion was formerly known as collateral estoppel. It limits the relitigation of issues that have been decided in a previous case.
26. Claim preclusion was formerly known as res judicata. It bars claims that were or could have been litigated in a prior proceeding when there is an identity between the parties, an identity between the causes of action in the two suits, and a final judgment on the merits.
27. Estoppel by record prevents a party from litigating what was litigated or might have been litigated in another proceeding.
28. Judicial estoppel prevents a party

from asserting a position in a legal proceeding and then taking an inconsistent position, in an attempt to manipulate the judiciary as an institution. Defendant claimed

the State attempted to manipulate the judiciary as an institution by taking inconsistent positions: According to the Defendant, the State convinced the court in the first case that it

conceded that the expert's BAC testimony would be excluded in a second action, and the State then took a contradictory position by introducing the testimony at the second trial.

### ***Look for these upcoming programs!***

- ✓ **November 11-12, 2004, *Sixth Annual Prosecutor's Seminar on OWI***, The Osthoff Resort, Elkhart Lake (for prosecutors only).
- ✓ ***Regional Legal Update Classes (Traffic/OWI/Search & Seizure):***
  - ✓ **December 2, 2004**, Northcentral Technical College, Wausau. Contact: Brian Fiene, [Fiene@ntc.edu](mailto:Fiene@ntc.edu)
  - ✓ **December 14, 2004**, Blackhawk Technical College, Janesville. Contact: Terry Fell, [tfell@blackhawk.edu](mailto:tfell@blackhawk.edu)
  - ✓ **January 6, 2005 & March 24, 2005**, Nicolet Area Technical College, Rhinelander. Contact: J. Boyer, [jboyer@nicoletcollege.edu](mailto:jboyer@nicoletcollege.edu)
  - ✓ **February 10, 2005**, Western Wisconsin Technical College, Sparta. Contact: Michael Earll, [earllm@wwtc.edu](mailto:earllm@wwtc.edu)
- ✓ **March 29-30, 2005, *11<sup>th</sup> Annual Traffic and Impaired Driving Law Program***, The Radisson Paper Valley Hotel, Appleton. (Brochures available in January 2005.)

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<sup>6</sup> *Jones v. Albaugh*, 2004 U.S. Dist. LEXIS 4529.

<sup>7</sup> 124 S. Ct. 1379, 1389 (2004).

<sup>8</sup> *Id.*, at 1381.

<sup>9</sup> *Id.*, at 1386.

<sup>10</sup> *Id.*, at 1387.

<sup>11</sup> *Id.*

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<sup>28</sup> Judicial estoppel prevents a party from asserting a position in a legal proceeding and then taking an inconsistent position, in an attempt to manipulate the judiciary as an institution. Defendant claimed the State attempted to manipulate the judiciary as an institution by taking inconsistent positions: According to the Defendant, the State convinced the court in the first case that it conceded that the expert's BAC testimony would be excluded in a second action, and the State then took a contradictory position by introducing the testimony at the second trial.